



STATE OF DELAWARE
DEPARTMENT OF TRANSPORTATION

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P.O. Box 778
DOVER, DELAWARE 19903

JENNIFER COHAN
SECRETARY

March 8, 2017

The Honorable Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th St., SW
Washington, DC 20554

RE: Response to Public Notice – Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling WT Docket No. 16-421

Dear Secretary Dortch:

The State of Delaware, Department of Transportation (DelDOT) is submitting the attached comments concerning Docket Number 16-421, Mobilitie LLC Petition for Declaratory Ruling.

Although Docket Number 16-421 poses many questions toward county and local governments, DelDOT is submitting these comments from the perspective of the State of Delaware. Delaware is the second smallest state in the nation at only 1982 square miles. However, DelDOT has responsibility for 13,541 lane miles of highways. That is almost ninety percent of all lane miles of roadway within Delaware. DelDOT has by far the greatest involvement in the State of Delaware with respect to the issues being contemplated in your public notice. The three county governments in Delaware have no responsibility for roadways or own roadway rights of way. Each of the 57 municipalities in Delaware does have responsibility for municipal roads and may respond separately to your public notice.

Thank you for the opportunity to offer comment. Should you wish to discuss any of our comments more fully, please feel free to contact me at 302-760-2305.

Sincerely,

Robert B. McCleary, P.E.
Chief Engineer

RM:cf/lis

Cc: Honorable Jennifer Cohan, Secretary, Department of Transportation
Bob Cunningham, Chief of Right of Way Section, DelDOT
Monroe Hite III, Manager, Right of Way Engineering, DelDOT
Eric Cimo, Utilities Engineer, DelDOT



To the various questions regarding identification of local conditions that hinder deployment of new services, DelDOT offers the following responses:

Pursuant to 202(c) of Title 26 of the Delaware Code, provides that cellular transmitting and receiving services are not under the jurisdiction of the Delaware Public Service Commission and companies that provide such services are not considered public utilities in Delaware. As such, cellular system infrastructure is not permitted within State of Delaware rights of way¹.

Mobilitie, and companies like them, are not considered public utilities because they are not providing service to the end user (customer). Section 102 of title 26 of the Delaware code provides that: *"(2) 'Public utility' includes every individual, partnership, association, corporation, joint stock company, agency or department of the State or any association of individuals engaged in the prosecution in common of a productive enterprise (commonly called a 'cooperative'), their lessees, trustees or receivers appointed by any court whatsoever, that now operates or hereafter may operate for public use within this state, (however, electric cooperatives shall not be permitted directly or through an affiliate to engage in the production, sale or distribution of propane gas or heating oil), any natural gas, electric (excluding electric suppliers as defined in § 1001 of this title), water, wastewater (which shall include sanitary sewer charge), telecommunications (excluding telephone services provided by cellular technology or by domestic public land mobile radio service) service, system, plant or equipment"*.

A Neutral Host Provider (NHP), such as, Mobilitie, Crown Castle, etc., have only a single customer, the cellular service provider to whom they are contracted. Accordingly they are not a public service entity as they do not provide any services to the public, but in fact they are a middleman between the public and the service providers.

The definition of public utility found in *26 Del. C. §102(d)* provides that a public utility must be, *"for public use"*. As these small cell sites do not serve the public they are not for a public use and therefore the provider cannot be considered a public utility under Delaware law. The cellular antenna that the NHP is placing on their own pole is not owned or operated by the NHP; it is owned and operated by the cellular carrier. The NHP does not hold the proper Federal Communication Commission (FCC) licenses or rights to the frequencies of the electromagnetic spectrum to operate the cellular antenna. So, if this NHP is allowed in the right of way, they do not own, operate, or control all the equipment on their own pole. The cellular company that holds the FCC license for the electromagnetic radiation that is transmitting from the pole does not hold a Certificate of Public Convenience and Necessity (CPCN) or been granted franchise rights from the State of Delaware to be in the right of way. Yet this company is the one with Delaware customers (end users). This appears to be a business relationship between the NHP and the cellular provider where neither party is fully responsible for the entire system. If anything, it appears their business relationship is designed to divert responsibility. This is important because there needs to be clear ownership and accountability related to any installation placed in the public right of way for safety and liability reasons.

Many land-based telecommunication companies provide services within the state of Delaware. Those companies are considered public utilities, their rates are regulated by the Delaware Public Service Commission, and DelDOT regulates accommodation of their infrastructure within public rights of way.

¹ Delaware Title 26 Chapter 1, §202(c) Limitations on Jurisdiction of Commission;

(c) The Commission shall have no jurisdiction over the operation of telephone service provided by cellular technology or by domestic public land mobile radio service or over the rates to be charged for such service or over property, property rights, equipment or facilities employed in such service.

Such companies provide ample internet bandwidth through their fiber optic lines to meet the growing demand for broadband services. There are multiple purveyors of fiber optic telecommunication systems operating in each of Delaware's counties. New Castle County has 18 such companies, Kent County has nine, and Sussex County has seven. This is significant coverage considering Delaware is the second smallest state by land area at only 1982 square miles². In more remote locations, like the western United States, wireless backhaul may be a good solution because no other options exist. Delaware is not like that. Traditional fiber and copper systems are already in place on most of Delaware's roadways. If any gaps exist, the fiber companies already operating here can fill them. Moreover, if Mobilitie wished to invest in constructing fiber or copper based "backhaul and transport facilities"³ within the State of Delaware, there would be little to "impede those investments or slow the deployment of essential wireless infrastructure."⁴ They could work to acquire the approvals necessary to install fiber as other entities have done within the Delaware's rights of way. They choose not to. It is the belief of DelDOT that Mobilitie has failed to demonstrate a need to place wireless infrastructure in Delaware's rights of way, which is especially true on roads that already have fiber available from multiple companies. It simply is not necessary or proper for wireless installations to be accommodated in Delaware's rights of way.

Aside from the fact that Mobilitie is not considered a public utility in Delaware, there are other factors that pose significant barriers to deployment of small cell infrastructure in the public right of way including land use control issues, eminent domain issues, and traffic safety issues.

Regarding land use: in Delaware, each of the three counties and 57 municipalities controls land use within their respective municipal boundaries. DelDOT controls the State's rights of way. The State's rights of way are not subjected to local land use or zoning requirements. Only public utilities are granted franchise rights to place poles or other infrastructure within the State's right of way. As cellular providers are not considered public utilities in Delaware, they are not entitled to franchise rights or otherwise permitted access to the State's roadway rights of way. Accordingly, companies like Mobilitie must locate their facilities outside the public rights of way, which subjects the company to local land use and zoning requirements. While DelDOT understands the increasing demand for cellular service, and that going through local land use approvals takes time, DelDOT believes that there are legitimate legal reasons justifying the continued authority of local agencies to control land use decisions over the placement of cellular facility installations.

In particular, local land use authorities have processes in place, including requirements for public workshops and hearings that allow interaction and involvement of all stakeholders. Important

² <http://delaware.gov/topics/facts/geo.shtml> -&-

Delaware TITLE 29 State Government General Provisions CHAPTER 2. STATE BOUNDARIES

§ 201 Description. The limits of the State are as follows: On the south, the divisional line between Delaware and Maryland; on the west, the divisional line between Delaware and Maryland extended northerly to its intersection with the southerly boundary line of Pennsylvania; on the north, the boundary line between Maryland and Pennsylvania extended easterly to its intersection with the 12 mile circle described from New Castle and the 12 mile circle extended to low water mark on the eastern side of the Delaware River; and on the east, the low water mark on the eastern side of the Delaware River within the 12 mile circle, the southerly perimeter of the 12 mile circle from its intersection with the low water mark westerly to the middle line of the Delaware River, the middle lines of the Delaware River and Bay below the 12 mile circle to the mouth of the Bay and the Atlantic Ocean.

³ Mobilitie - Petition for Declaratory Ruling. Pg.5- paragraph 1.

⁴ Mobilitie - Petition for Declaratory Ruling. Pg.5- paragraph 1.

considerations like height limitations, safety appurtenances, proximity to other uses, and aesthetics are taken into account in ways that contribute to a harmonious community, which is the purpose of zoning ordinances. If the FCC ultimately declares companies like Mobilitie should have unrestricted use of State rights of way, at least in Delaware, it would circumvent the local land use process because State-owned rights of way are not subject to local land use control. While they are subject to DelDOT regulation, DelDOT does not currently have a process that involves the public in decisions regarding the use of the right of way by public utilities.

DelDOT's process to accommodate public utilities in the right of way is as follows. First the public utility must apply for and receive a certificate of public convenience and necessity (CPCN) from the Delaware Public Service Commission (PSC). The granting of a CPCN does not automatically grant right of way access to a public utility. Second, the public utility enters into a franchise agreement with DelDOT. Once the public utility has a franchise agreement, the public utility must then acquire a utility permit for each individual installation. The DelDOT permit process is currently limited to traffic safety review to ensure proper maintenance of traffic during construction of the utility and restoration requirements for the roadway pavement, roadside surfaces, and landscaping. Should the FCC grant companies like Mobilitie the right to erect facilities in the state's right of way – that they would otherwise be prohibited from erecting on a privately-owned parcel due to local land use control – it would put DelDOT at odds with local land use agencies and the public. In Delaware, that situation would be untenable. A rule like this would require DelDOT to change its permitting process. Del DOT would need to include public involvement, workshops and hearings, in order to ascertain potential impacts from proposed small cell site installations and identification of mitigation strategies. In the end, it would just complicate the approval process for these wireless companies, and all other public utility companies because the Department would be required to treat all structures potentially being placed within the right of way equally. That would require DelDOT to regulate a service pole for electric, telephone and CATV the same as a cellular tower or steel mono-pole for microwave back haul. DelDOT strongly believes land use decisions should remain with the local agencies. The FCC should not issue any declaratory order that would attempt to circumvent the authority of local public bodies to determine what is appropriate in their communities pertaining to small cell infrastructure. Moreover, local land use control is established by CFR 23 C1 (g)§645.211, (d) and CFR 23 C1 (g) § 645.205, (a). It is unclear to DelDOT where the Federal Communication Commission has jurisdiction to circumvent local land use control.

Eminent Domain Concerns

When these installations are located in the public right of way, there must be a clear understanding they are a public use and accommodation in the right of way is necessary. Under Delaware law and regulations, if companies like Mobilitie were considered public utilities (currently they are not) they would be eligible for accommodation in the State's right of way. When roadways are widened, DelDOT would – as is done for all public utilities, – attempt to accommodate the existing facilities in the newly acquired right of way. Buying the additional right of way to accommodate relocated utilities is a significant expense by the State of Delaware to the benefit of public utilities. DelDOT does not charge the utilities for that expense. The Department believes this approach is justified because the public utilities are a public use, and in the case of traditional pipes and wires type utilities, the footprint of land is necessary for their accommodation. However, when it comes to wireless type services, demonstrating the necessity to be in the right of way is not so clear or easy.

When considering necessity of wireless installations to be in the right of way, it helps to compare their situation with that of traditional utilities. Pipe & wire type utilities, when they are accommodated within the right of way, originate outside the right of way, travel along the right of way, and exit to service the end user. For utilities like water, sewer, gas, and land-line telephone, there is a clear nexus

between the services provided to the private properties along the road and the necessity of their accommodation within the right of way. All the homes, businesses and institutions are directly connected to these utilities from the street. That is not the case with services that are provided over the airwaves. Broadcasted services can come from anywhere. Lacking direct connection to private properties fronting a roadway, draws into question the necessity for an antenna or pole to be located in any one particular spot on the ground, or in the right of way at all.

Another relevant test of necessity will come at the time of future relocations. Assuming wireless equipment was accommodated in the right of way, how does DelDOT acquire additional right of way when those facilities need to be relocated? Currently, DelDOT can neither demonstrate wireless installations are a public use or that the acquisition is necessary because the antenna/pole could be located elsewhere and function just the same.

Additionally, these companies like Mobilitie, often only provide a “backhaul and transport service” to other companies, meaning they provide no service to the properties that front the road. For these reasons, DelDOT anticipates those owners will fail to see the necessity of any acquisition of their property to accommodate a facility that provides no service to them. This poses a significant eminent domain issue and may cause confusion regarding the primary use of the right of way for transportation purposes.

During right of way acquisition, a narrow strip of each property fronting a roadway is acquired by the State to accommodate roadway widening and the relocation of public utilities. The property owners along the road are impacted equally because the utilities occupy space along the entire corridor. But a single cellular pole or tower in the right of way will only impact one property owner and that owner may not even be a customer of that wireless provider. In a condemnation proceeding where DelDOT must demonstrate the necessity of the public taking of private land in front of Delaware Superior Court, DelDOT must be able to argue the necessity of the pole’s location to justify its impact to just that one private property owner.

If DelDOT cannot relocate wireless antennas, poles, and towers when needed, it will delay necessary transportation improvements and increase project costs. It is likely that one reluctant property owner could cause a larger community of people to have to choose between improvements to traffic safety or cellular service from the right of way. That is not a position the Department should be in on any roadway.

This eminent domain issue also creates potential economic impacts for any wireless facilities accommodated in the right of way. Where the State of Delaware cannot accommodate the relocation of a wireless installation, it would have to be removed to make way for the transportation improvement. Such a scenario would leave those companies worse off than if they had located outside the right of way from the beginning because they will be entitled to no compensation for that impact. For instance, private property owners impacted by DelDOT projects are eligible for compensation via the federal *Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970*⁵ when impacted by highway work. State law affords similar compensation under *17 Del. C. §137*⁶. Companies like Mobilitie would be better off located on private property. If they were, DelDOT would offer compensation to cover the cost of relocations when those sites are impacted by highway work. In contrast, when located within the right of way, under Delaware law and regulations, they would bear the

⁵ https://www.fhwa.dot.gov/real_estate/publications/act.cfm

⁶ <http://delcode.delaware.gov/title17/c001/sc03/>

cost of relocations themselves. That relocation cost, and time to complete the relocation, will be exacerbated if DelDOT is unable to acquire additional right of way to accommodate their relocation. There is an economic benefit for small cell site installations to be located outside the right of way in Delaware.

Traffic Safety Concerns

New or additional above ground facilities, like antennas/poles/towers, adjacent to roadways will need to be located outside the clear zone of those roadways in order to minimize the risk to drivers associated with run-off-the-road type crashes. Clear zone requirements can be found in the AASHTO Roadside Design Guide as well as under Delaware Code. DelDOT's Road Design Manual provides further guidance. Section 3.3.6.2 CLEAR ZONE of the DelDOT Road Design Manual lists the definition of a "clear zone" as: *"the total roadside border area, starting at the edge of the traveled way, available for safe use by errant vehicles. This area may consist of a shoulder, a recover-able slope, a non-recoverable slope, and/or a clear run-out area. The desired width is dependent upon the traffic volumes and speeds and on the roadside geometry."*⁷ From Section 3.3.6.2 CLEAR ZONE of the DelDOT Road Design Manual: *"This border area includes any shoulders or auxiliary lanes. Adequate lateral clearance between the edges of traffic lanes and roadside obstructions has been shown to be a very important safety factor. Vehicles leaving the roadway should have a reasonable opportunity to recover control and return to the roadway without overturning or colliding with roadside obstacles such as trees, poles, headwalls or other large objects. The combination of a relatively flat slope and an obstacle-free roadside within the prescribed clear zone helps this situation."* DelDOT makes every effort to decrease the number of possible obstructions within the right of way. This includes inspections for extra poles along a pole line, so-called "Double Wood", that pose a danger to the public. These extra poles pose a risk of sight clearance problems and additional locations for potential utility/vehicle collisions. From the 2011 AASHTO Roadside Design Guide: *"In 2008, 23.1 percent of the fatal crashes were single-vehicle, run-off-the-road crashes. These figures mean that the roadside environment comes into play in a very significant percentage of fatal and serious-injury crashes"*⁸. Of that 23.1%, 12% of the total numbers of fatalities were utility pole fixed-object impacts⁹. In the State of Delaware, roadway departure accidents were 40% of all fatalities and 10% of those were utility pole fixed-object impacts based upon 2007 through 2014 crash data.¹⁰ That equals 363 people in the small State of Delaware that lost their lives in single-vehicle; run-off-the-road crashes in a recent seven (7) year period, and three times that number were seriously injured. Decreasing, not increasing the number of stationary fixed objects in the right of way is "essential"¹¹ to saving lives along Delaware's roadways. For these reasons, DelDOT strongly believes accommodation of additional fixed object obstructions, like small cell pole installations; pose a significant roadside safety hazard to the traveling public.

⁷http://www.deldot.gov/information/pubs_forms/manuals/road_design/pdf/revisions042209/03_design_standards.pdf

⁸ AASHTO Roadside Design Guide.2011 edition. Pg. 1-2

⁹ AASHTO Roadside Design Guide.2011 edition. Pg. 1-3, Figure 1-2

¹⁰ DELAWARE STRATEGIC HIGHWAY SAFETY PLAN: TOWARD ZERO DEATHS Pg.33 – 37
http://www.deldot.gov/information/pubs_forms/manuals/shsp/DE_SHSP.pdf

¹¹ Mobilitie - Petition for Declaratory Ruling. Pg.11- paragraph 2.

To the various questions relating to the charging of application fees and charges for the use of rights of way, DelDOT offers the following responses:

The request by Mobilitie to the Federal Communications Commission (FCC) regarding “fair and reasonable compensation”, “competitively neutral and nondiscriminatory,” and “publicly disclosed by such government” statements within Section 253(c) of the Communications Act of 1934¹², as amended, are not pertinent to how DelDOT conducts business regarding utility accommodation within the public right-of-way. The State of Delaware does not charge utility companies to access the public right of way and as stated above, DelDOT controls almost 90% of the rights of way in the State¹³.

DelDOT charges no fees to public utilities for applications, franchise rights, or for the use of the State’s right of way. As stated above, the State of Delaware actually purchases additional rights of way at no expense to public utility companies in order to accommodate relocation of existing utilities impacted by highway work. Mobilitie, and other companies that provide cellular service or some combination of backhaul and cellular access, are not accommodated in the State right of way because they are not considered public utilities in Delaware.

While outside the purview of DelDOT, the Department believes it is important to note that the State of Delaware Public Service Commission ensures that pole attachment fees between utility pole owners and fiber optic cable companies are agreeable to both parties. *“Where a public utility and an attaching entity are unable to reach agreement with respect to the rates, term, and/or conditions under which an attaching entity may use facilities owned or controlled by a public utility, either party may file a petition requesting the commission to resolve the dispute.”*¹⁴ If Mobilitie feels they are being treated unfairly in the Delaware regarding pole attachment fees, they have the means to resolve their concerns at the State level.

While these wireless companies are not currently charged any fees by DelDOT, the DelDOT does have concerns about fair compensation to the State of Delaware. FCC’s consideration of Mobilitie’s petition could be construed that the FCC is considering granting certain property rights in Delaware’s rights of way to Mobilitie, and other unnamed wireless providers, which utilities do not currently have, own or enjoy. And further, this granting of property rights would come via a declaratory ruling without compensation to the State of Delaware. DelDOT kindly requests clarification on this point. In considering this concern, please understand that Delaware acquires right of way in fee simple estate rights using State funds, meaning Delaware owns all the property rights appurtenant to that land. No other entities hold property interests within the footprint of our rights of way, and therefore, there is no second or third party who might assert any ownership claim within Delaware’s rights of way or have a cause of action that might garner federal oversight. Public utilities are licensed in Delaware for specific periods of time to use the right of way, but they hold no ownership interest. DelDOT understands that the Federal Highway Administration (FHWA) will impose certain requirements on our rights of way, but that occurs as a result of the use of federal-aid highway funds. Other federal agencies

¹² Mobilitie - Petition for Declaratory Ruling. Pg.1- paragraph 1. “Section 253(c), 47 U.S.C. § 253(c), states, “Nothing in this section affects the authority of a State or local government to manage the public right-of-way or to require *fair and reasonable compensation* from telecommunications providers, *on a competitively neutral and nondiscriminatory basis*, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is *publicly disclosed by such government.*” (emphasis added)”

¹³ Delaware Transportation Facts 2014 : pg. #1 What We Do
http://www.deldot.gov/information/pubs_forms/fact_book/pdf/2014/2014DelDOTFactBook.pdf?052616

¹⁴ Public Service Commission of the State of Delaware: PSC Regulation Docket NO.16 pg.38 - 8. FAILURE TO REACH AGREEMENT 8.1

often impose requirements as a permit condition when such permits are required for a highway construction project. The Department's understanding is there has to be some federal action that would trigger federal oversight of State-owned right of way. Since Delaware imposes no fees on these companies, or in any way interferes with the utility's interstate commerce, DelDOT does not understand what federal action has been triggered that might grant the FCC regulatory control over Delaware's rights of way. DelDOT kindly requests the FCC to clarify its authority in this regard prior to issuance of any declaratory ruling.

In considering what authority the FCC may be able to wield over the right of way, DelDOT requests that the FCC also review and consider DelDOT's authority and jurisdiction over the State's rights of way. DelDOT is the agency granted jurisdiction, including the "absolute care, management, and control" of Delaware's rights of way (17 Del.C. §131(a)). DelDOT's jurisdictional authority over utility accommodation in the right of way is more fully spelled out in the Delaware Department of Transportation Utilities Manual Regulation (2007)(Title 2, Delaware Administration Code, §2400) This regulation explains the requirements and procedures necessary to facilitate utility installation, relocation, maintenance as well as any utility work in conjunction with highway project construction...."¹⁵

DelDOT's jurisdiction over State rights of way is reinforced at the Federal level by 23CFR C1(g) § 645.211(d)¹⁶ and 23CFR C1(g) §645.205(a)¹⁷. The United States Department of Transportation, Federal Highway Administration (FHWA) website states: *"Accommodation of utility facilities on highway right-of-way. The States must decide if they want utilities on highway right-of-way, including freeways, and if so to what extent and under what conditions. Whatever they decide must be documented in an FHWA-approved utility accommodation policy. A State may permit certain utilities and exclude others. Fees charged for utility use are at a State's discretion and may be used as the State sees fit. If a State so chooses, it can prohibit any longitudinal utility installations."*¹⁸ Therefore, it is at the discretion of each state department of transportation whether a utility, or any utility, is accommodated within the highway right of way.

Accommodation of utilities in the right of way is a secondary use to the primary use for transportation purposes. As stated in the DelDOT Utility Manual Regulations: *"The Mission of the State of Delaware's Department of Transportation is to provide a safe, efficient, and environmentally sensitive transportation network that offers a variety of convenient, and cost-effective choices for the movement of*

¹⁵<http://regulations.delaware.gov/AdminCode/title2/2000/2400/2401.pdf> Del DOT Utility Manual Pg. 1
1.0 Introduction paragraph #3

¹⁶ CFR Title 23 Chapter 1 Subchapter G Part 645.211(d) Compliance with applicable State laws and approved State transportation department utility accommodation policies must be assured. The responsible State transportation department's file must contain evidence of the written arrangements which set forth the terms under which utility facilities are to cross or otherwise occupy highway right-of-way. All utility installations made on highway right-of-way shall be subject to written approval by the State transportation department. However, such approval will not be required where so provided in the use and occupancy agreement for such matters as utility facility maintenance, installation of service connections on highways other than freeways, or emergency operations.

¹⁷ 23 CFR §645.205 Policy. Pursuant to the provisions of 23 CFR 1.23, it is in the public interest for utility facilities to be accommodated on the right-of-way of a Federal-aid or direct Federal highway project when such use and occupancy of the highway right-of-way do not adversely affect highway or traffic safety, or otherwise impair the highway or its aesthetic quality, and do not conflict with the provisions of Federal, State or local laws or regulations.

¹⁸<https://www.fhwa.dot.gov/utilities/>

people and goods."¹⁹ Accommodation of utilities will always be secondary to the Department's mission to provide transportation. Utilities can be, and often are, accommodated within Delaware's roadways, but it is not "essential"²⁰ that the utility is located within the right of way. And DelDOT has the jurisdiction and authority to deny franchise rights.

Use of public rights of way for commercial purposes

Delaware does prohibit commercial use of the State's rights of way (17Del C5 § 526(a))²¹. To explain, the sale of any commercial goods like automobiles or fresh produce (e.g., fruit stands) are prohibited. The prohibition of commercial use extends to many activities and protects the State's interest in the road for transportation purposes. When it comes to utilities, they may be located in the right of way, but not sold from the right of way. This process works because utilities originate from outside the right of way, enter and travel along the right of way, and exit onto private property. The utility customer is being serviced on private property, not in the right of way. Thus traditional pipe and wire public utilities are not using the right of way for the conduct of their business. If the point of origination for a cellular signal is a pole within the right of way, one could argue the wireless "utility" would be "selling" its product from that point within the right of way. It is the opinion of DelDOT that having a point of sale within the right of way would be a commercial use of the right of way and not allowed under Delaware Code. It could also be perceived as placing the State of Delaware in partnership with the wireless utility where the State is providing locations from which the wireless utility can perform business for profit, while denying that same benefit to all other public utilities.

For all the reasons stated herein, the Delaware Department of Transportation requests that the Federal Communication Commission (FCC) deny in total Mobilite's petition for declaratory ruling.

¹⁹<http://regulations.delaware.gov/AdminCode/title2/2000/2400/2401.pdf> Del DOT Utility Manual Pg. 1

²⁰Mobilite - Petition for Declaratory Ruling. Pg.11- paragraph 2.

²¹ Delaware Title 17 Chapter 5, § 526(a) Except as provided in subsection (b) of this section, there shall be no commercial activity within any rights-of-way under the Department's jurisdiction in the unincorporated areas of the State. As used herein, "commercial activity" includes, without limitation, such activities as the placement of news boxes in such rights-of-way for the sale of newspapers, the placement of vending machines in such rights-of-way for the sale of goods, the placement of commercial advertising signs in such rights-of-way or the sale of goods from vehicles parked within such rights-of-way. If a commercial activity occurs within the clear zone of any such rights-of-way, the Department shall treat the machines, fixtures, signs or other materials used in such activity as an artificial obstruction under § 525 of this title, and may undertake the immediate removal of said materials as authorized therein.